

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODYFILED
DISTRICT COURT OF GUAM

APR 12 2004

MARY L. M. MORAN
CLERK OF COURT

United States District Court		District DISTRICT OF GUAM	
Name of Movant HENRY FRESNOZA		Prisoner No. 02134-093	Case No. CR-01-00013-001

Place of Confinement

FPC-Sheridan, P.O. Box 6000, Sheridan, Oregon 97378

UNITED STATES OF AMERICA

v.

HENRY FRESNOZA

(name under which convicted)

CV-04-00020

MOTION

1. Name and location of court which entered the judgment of conviction under attack U.S. District Court
District Of Guam, Hon. John S. Unpingco
2. Date of judgment of conviction April 17, 2003.
3. Length of sentence 87-months
4. Nature of offense involved (all counts) Attempted Possession Of 200 Grams Of Crystal Metham-
phetamine aka "ICE" With Intent To Distribute. Title 21 U.S.C. §§841(a) and 846.
5. What was your plea? (Check one)
 - (a) Not guilty ☐
 - (b) Guilty ☒
 - (c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
 - (a) Jury ☐
 - (b) Judge only ☐
 N/A
7. Did you testify at the trial?
Yes ☐ No ☐ N/A
8. Did you appeal from the judgment of conviction?
Yes ☐ No ☒

9. If you did appeal, answer the following:

- (a) Name of court _____ N/A
- (b) Result _____
- (c) Date of result _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
Yes ☐ No ☒

11. If your answer to 10 was "yes," give the following information:

- (a) (1) Name of court _____ N/A
- (2) Nature of proceeding _____ N/A
- (3) Grounds raised _____ N/A
- (4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐ N/A
- (5) Result _____ N/A
- (6) Date of result _____

(b) As to any second petition, application or motion give the same information:

- (1) Name of court _____ N/A
- (2) Nature of proceeding _____ N/A
- (3) Grounds raised _____ N/A

- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: CONVICTION OBTAINED BY THE UNCONSTITUTIONAL FAILURE OF THE PROSECUTION TO DISCLOSE ITS CONFLICTING PRIMA FACIE EVIDENCE OF THE LAW.

Supporting FACTS (state *briefly* without citing cases or law) The Government failed to disclose to Movant that Title 21 U.S.C. never has been enacted into positive law and that such condition had placed preexisting "prima facie" sections conflicting with their creator Statute at Large, after having been amended by New Actions from numerous Amendatory Acts. (See Attached Memorandum titled: FIRST MEMORANDUM OF POINTS AND AUTHORITIES).

B. Ground two: DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL BY ALLOWING PLEA WITHOUT UNDERSTANDING NATURE OF CHARGE AND PLEA'S CONSEQUENCES.

Supporting FACTS (state *briefly* without citing cases or law): Counsel's effectiveness is in question after having convinced Movant to plea guilty in less than 48 hours from the time of Movant's arrest. Movant claims that counsel's advice "just agree now and go home" created an illusional understanding over the nature of the charge and the consequences of the plea. (See Attached Memorandum titled: SECOND MEMORANDUM OF POINTS AND AUTHORITIES, pages -1 thru 7-)

C. Ground three: DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL BY NOT MITIGATING SENTENCING ENTRAPMENT.

Supporting FACTS (state *briefly* without citing cases or law): Counsel failed to mitigate the Sentencing Entrapment which is part of the Government's dominion and control of the amount of drugs involved in the Government's reverse-sting operation. (See Attached Memorandum titled: SECOND MEMORANDUM OF POINTS AND AUTHORITIES, pages -7 thru 10).

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

D Ground four DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL BY NOT
MITIGATING THE DRUG'S MIXTURE.

Supporting FACTS (state *briefly* without citing cases or law): Counsel failed to mitigate the "ICE's" mixture as a requisite for the Sentencing Guidelines' purposes. (See Attached Memorandum titled: SECOND MEMORANDUM OF POINTS AND AUTHORITIES, pages 10 thru 12).

E Ground five DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL BY NOT
MITIGATING THE AMOUNT OF DRUGS ATTRIBUTABLE TO
MOVANT.

Supporting FACTS (state *briefly* without citing cases or law): Counsel failed to mitigate the correct amount of "ICE" attempted to possess with intent to distribute since no conspiracy charge exists in this case. The records show a controvertible issue of what amount of "ICE" was clearly found in Movant's left front pant's pocket. (See Attached Memorandum titled: SECOND MEMORANDUM OF POINTS AND AUTHORITIES, pages 12 thru 15).

F Ground six DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL BY NOT
MITIGATING MOVANT'S ACTION AS ABERRANT.

Supporting FACTS (state *briefly* without citing cases or law): Counsel failed to mitigate the Movant's action as aberrant during sentencing for a court's consideration for a downward departure within the sentencing court's discretion. (See Attached Memorandum titled: SECOND MEMORANDUM OF POINTS AND AUTHORITIES, pages 15 thru 18).

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

G Ground seven DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL BY NOT
DEFENDING CONVICTION OBTAINED WITH AN UNCONSTITU-
TIONAL STATUTE.

Supporting FACTS (state *briefly* without citing cases or law) Counsel failed to defend against an unconstitutional statute which impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Article III district court, based on precedent question of interpretation of Article III, already established by the Supreme Court. (See Attached Memorandum titled: THIRD MEMORANDUM OF POINTS AND AUTHORITIES).

H Ground eight : CONVICTION OBTAINED OUTSIDE FROM THE DISTRICT COURT'S POWER TO HEAR THE CASE.

Supporting FACTS (state *briefly* without citing cases or law): Movant claims that the alleged offense "Attempted Possession With Intent To Distribute cannot
be made an offense against the United States because it occurred
outside of the federal Government's exclusive or concurrent federal
territorial jurisdiction under Title 40 U.S.C. §255. (See Attached
Memorandum titled: FOURTH MEMORANDUM OF POINTS AND AUTHORITIES).

Ground _____

Supporting FACTS (state *briefly* without citing cases or law): _____

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

____ Ground _____ :

Supporting FACTS (state *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A thru 12-H were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: _____

"A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdiction grounds in a collateral proceeding. See, Baldwin v. Traveling Mens Ass'n., 283 U.S. 522, 525, 75 L.Ed. 1244, 51 S.Ct. 517 (1931).

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Richard Arens

(b) At arraignment and plea Richard Arens

(c) At trial N/A

(d) At sentencing Phillip Torres, 330 Hernan Cortez Avenue, Suite 200

(e) On appeal N/A

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

N/A

(b) Give date and length of the above sentence: _____

N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

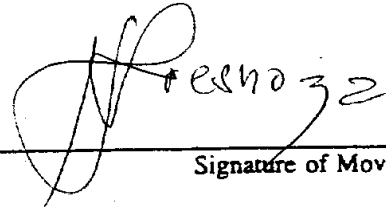
Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

April 2, 2004
(date)


Signature of Movant